

# ARKANSAS COURT OF APPEALS

DIVISION III  
No. CA08-1426

NORWOOD LOGGING, INC.,  
AIG CLAIM SERVICES, INC.  
APPELLANTS

V.

DAVID LEWIS  
APPELLEE

**Opinion Delivered** MAY 13, 2009

APPEAL FROM THE ARKANSAS  
WORKERS' COMPENSATION  
COMMISSION [NO. F709523]

AFFIRMED

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**WAYMOND M. BROWN, Judge**

By opinion filed October 6, 2008, the Workers' Compensation Commission adopted the administrative law judge's (ALJ) findings that David Lewis was an employee of Norwood Logging, Inc., when he was hurt on June 21, 2007, and that the accident arose out of the course of Lewis's employment with Norwood Logging. Norwood Logging and its carrier, AIG Claim Services (collectively referred to as "Norwood Logging"), appeal from the Commission's decision, contending (1) that Lewis failed to establish that he suffered a compensable injury in light of the Commission's finding that he was not credible, (2) that the Commission improperly discredited the testimony of one of their witnesses and arbitrarily disregarded the testimony of two of their other witnesses, and (3) that Lewis failed to rebut the presumption that his injuries were substantially occasioned by the use of drugs and alcohol. The Commission's decision is supported by substantial evidence; therefore, we affirm.

The record in this case is full of inconsistencies and contradictions. All of the witnesses

except for one were related, and the ALJ found both Lewis and Norwood Logging's primary witness, David Norwood, not to be credible witnesses. The only material fact to which the parties agreed was that Lewis was injured on June 21, 2007, when a tree limb fell on his head.

Lewis quit school after the eighth grade, and he could not read or write. He regularly smoked marijuana and drank beer. He has been incarcerated for felony negligent homicide, and he has been convicted of DWI multiple times. He was related to the Norwood family by marriage. According to his testimony, he became employed by Norwood Logging one morning while sitting at a gas station where his sister-in-law worked. Lewis stated that he was drinking a cup of coffee when David came to the store and asked Lewis to work as a saw hand. Lewis replied that he had something to do that day, but that he would be able to start the following morning. Lewis testified that the two agreed to payment of \$100 per day and that he (Lewis) preferred payment in cash because checks were too difficult for him to cash. Though Lewis acknowledged his frequent use of drugs and alcohol, he denied being under the influence of drugs and alcohol at the time of his accident. He stated that he had not smoked any marijuana during the three days leading up to the accident and that, while he had drunk a six-pack of beer the night before, he was sober the next morning.

According to Lewis's testimony, on the day of the accident, Lewis met David at David's house, then he (Lewis) drove the work truck to the work site in Stuttgart, even though he did not have a driver's license. The accident occurred while Lewis was topping trees. He had cut down a tree and was about to top it when a limb fell from another tree and hit him in the head. According to Lewis's testimony, the tree knocked him out. He eventually

stood up, walked to David, and told David that he needed to go to the hospital. David took Lewis to the hospital in Stuttgart, helped him give the hospital information, and signed the paper allowing the hospital to treat him. Medical records show that Lewis was transferred to University Hospital in Little Rock, where he remained for several days and was placed in a body cast.

On cross-examination, Lewis acknowledged that he testified during his deposition that he had no source of income after his accident other than his wife's social security and his SSI. However, counsel for Norwood Logging presented documents from a recycling plant showing that Lewis had taken in scrap iron on a weekly basis since October 26, 2007. Lewis denied being on the site on his own to cut firewood or to finding scrap iron on the day of the accident. On redirect, he stated that it was a two-hour drive between Malvern and Stuttgart and that there were plenty of places around Malvern where he could cut firewood.

Judy Brown, Lewis's sister-in-law, was called to testify. She corroborated Lewis's testimony regarding the conversation where David asked Lewis to work. However, Brown stated that Lewis and David met at the gas station the next morning. Lewis also called county judge Bill Scrimshire to testify; however, Judge Scrimshire merely confirmed the presence of Lewis and the Norwood family at the work site on an occasion other than the day that Lewis was injured.

David, Phillip Norwood, and Christine Norwood testified on behalf of Norwood Logging. Phillip is the owner, and Christine works in the office doing bookkeeping and administrative tasks. On direct testimony, David described himself as a contractor, but that

he worked only for Norwood Logging. He denied having the ability to hire for Norwood Logging, and he stated that everyone working for Norwood Logging was paid by the ton. He denied talking to Lewis about working for Norwood Logging. David stated that Lewis was at the work site to pick up junk and that, on the day of the accident, Lewis drove his own truck. He testified that he volunteered to take Lewis to the hospital and that, when they arrived at the hospital, Lewis communicated with hospital staff. David admitted signing a form due to Lewis being unable to read or write. David said that Norwood Logging requires a drug test from anyone who is injured at work and that he did not request a drug test for David. He also stated that Norwood Logging requires its employees to wear protective equipment while working and that David was wearing no gear when he was injured.

On cross-examination, David acknowledged that he was sitting at the counsel's table next to the attorney for Norwood Logging, but he denied being the company's representative at the hearing. He stated that Phillip paid him by the ton, but that he used Norwood Logging equipment to do the job. He recounted his testimony that Lewis did most of the communicating while at the hospital, while he merely signed the document due to Lewis's illiteracy. However, he acknowledged that he listed his relationship to Lewis as "Employer." David claimed that he did so because he was afraid the hospital would not have provided treatment otherwise.

Phillip and Christine also denied that Lewis was a Norwood Logging employee. They acknowledged that Lewis did some logging work for Norwood Logging in 2002 and 2003, but they denied that Lewis was an employee on the day of the accident. They also

corroborated David's testimony regarding Norwood Logging's drug-testing, safety-equipment, and worker-payment policies. Christine also testified about the company's policies regarding workers' compensation claims, stating that she calls the insurance carrier immediately upon learning of an injury.

On cross-examination, Christine recalled stopping by University Hospital in Little Rock to see Lewis, but she denied having an envelope with cash in it that day or giving such an envelope to Lewis. In response, Lewis called his wife, Jennifer, to testify. Jennifer recalled seeing Christine at the hospital one day with an envelope containing over \$400 in cash. She did not see Christine leave the envelope with Lewis, but when questioned by the ALJ, she recalled Christine telling her that she and Phillip would try to help Lewis.

As previously mentioned, the ALJ found that Lewis was not a credible witness because he had made several inconsistent representations and was a convicted felon. However, he also found David to be less than truthful, observing that David "appeared to be extremely cautious and evasive in his testimony." The ALJ was convinced that David was an employee, not an independent contractor, of Norwood Logging. He acknowledged the testimony from Phillip and Christine that David was an independent contractor, but he found that the testimony was self-serving. Given the hearing testimony, the ALJ found that Norwood Logging treated its workers as employees rather than independent contractors. In the end, the ALJ found that Lewis established his claim, given the evidence regarding the visit to the Stuttgart hospital and his opinion that Lewis would not drive from Malvern to Stuttgart to cut firewood. He also found that Norwood Logging failed to establish that the accident was substantially occasioned

by the use of drugs or alcohol, given the lack of evidence that Lewis was impaired at the time of the injury. The Commission affirmed and adopted the decision of the ALJ.

Norwood Logging appeals from the Commission's opinion, asserting that the opinion is not supported by substantial evidence. It contends that Lewis could not have established proof of a compensable injury in light of the finding that he was not credible. It also argues that the Commission erred in finding that David was not credible and in disregarding Phillip's and Christine's testimony. Finally, it contends that Lewis failed to rebut the presumption that his injuries were substantially occasioned by the use of drugs and alcohol.

Our standard of review requires us to view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirm if that decision is supported by substantial evidence. *See Smith v. City of Ft. Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Williams v. Prostaff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). The Commission is not required to believe the testimony of any witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *See Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). Once the Commission has made its decision on issues of credibility, we are bound by that decision. *Id.*

To establish entitlement to workers' compensation benefits, a claimant has the burden of proving, among other things, that he suffered internal or external physical harm to the body or accidental injury arising out of and in the course of employment. Ark. Code Ann. § 11-9-

102(4)(A)(i) (Supp. 2007); *Carman v. Hayworth, Inc.*, 74 Ark. App. 55, 45 S.W.3d 408 (2001). The Commission must weigh the evidence impartially and without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704(c)(4) (Repl. 2002).

We can easily dispose of Norwood Logging's first two arguments. Norwood Logging would have us reverse on the argument that Lewis should not have been believed and that David should have been found to be credible. But as previously stated, determinations of credibility are for the Commission, not this court. Even in the face of Lewis's inconsistent testimony, the Commission was within its power to accept Lewis's claim that he was a Norwood Logging employee at the time of his injury. It was also within the province of the Commission to reject David's testimony, which was just as inconsistent as Lewis's. Norwood Logging also faults the Commission for arbitrarily disregarding Phillip's and Christine's testimony. We disagree, as the Commission explicitly found their testimony to be self-serving. The Commission had to sort through inconsistent testimony to determine whether Lewis was an employee of Norwood Logging when he was injured. Reasonable persons could reach the conclusion found by the Commission; therefore, we must affirm that decision. *See Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

Norwood Logging's argument that Lewis failed to rebut the drug/alcohol presumption also has no merit. The definition of compensable injury does not include an injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. Ark. Code Ann. § 11-9-102(4)(B)(iv)(a). The presence of alcohol, illegal drugs, or prescription drugs used in contravention of physician's

orders creates a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. Ark. Code Ann. § 11-9-102(4)(B)(iv)(b). Absent evidence that the claimant had illegal drugs or alcohol in his system, the presumption does not apply. See *Morrilton Manor v. Brimmage*, 58 Ark. App. 252, 952 S.W.2d 170 (1997).

The record does not contain substantial evidence that Lewis had any illegal drugs or alcohol in his system. Norwood Logging argues that, given Lewis's admissions regarding his drug and alcohol use, he would have been unable to pass a drug test had one been given. The problem, however, is that no drug test was given, and the Commission cannot resort to conjecture or speculation to find that Lewis had drugs or alcohol in his system at the time of the accident. See *Brimmage, supra* (rejecting the argument that the employer raised the drug presumption when codeine was found in a urine sample collected two days after the injury). Because Norwood Logging failed to establish the presence of drugs or alcohol in Lewis's system at the time of the accident, no presumption arose that Lewis's accident was substantially occasioned by the use of drugs or alcohol.

Despite the issues that Norwood Logging has with Lewis's credibility, substantial evidence supports the Commission's award of benefits to Lewis. Accordingly, we affirm.

Affirmed.

GLOVER and HENRY, JJ., agree.